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No. 83715-5

SUPREME COURT OF THE STATE OF WASHINGTON

MAUREEN T. BLAIR and KENNETH E. BLAIR,

Appellants,

v.

TA - SEATTLE EAST #176,
d/b/a TRAVELCENTERS OF AMERICA,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

TA – Seattle East #176, d/b/a TravelCenters of America ("TravelCenters"), defendant and respondent in the courts below, answers the Blairs' petition for review.

II. COUNTERSTATEMENT OF THE CASE

This was a slip-and-fall case, subject to King County local rules and a case scheduling order.[1] The Blairs complained on appeal that it had been an abuse of discretion for the trial court, without making certain express findings they contended are required by *Burnet v. Spokane Ambulance*,[2] and *Peluso v. Barton Auto Dealerships, Inc.*,[3] to strike two health care provider witnesses that they disclosed for the first time 20 days before trial in October 2007,[4] and then to dismiss their lawsuit for lack of expert medical opinion testimony that Mrs. Blair's fall at TravelCenters' truck stop in 2003 caused her to need a hip replacement in 2005.[5]

The order striking the two late-disclosed witnesses enforced two prior orders concerning disclosure of witnesses and imposed monetary sanctions on the Blairs for defying those prior orders. The first prior

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[1] CP 367-71.

[2] 131 Wn.2d 484, 132 P.3d 115 (2006).

[3] 138 Wn. App. 65, 155 P.3d 978 (2007).

[4] CP 216-17.

[5] CP 307-09.

witness-disclosure order had been entered on August 14, 2007.[6] It was entered after the Blairs failed to meet either of two court-ordered deadlines for disclosing possible trial witnesses.[7] The Blairs had served, late, a list of 15 possible witnesses (which included no experts and no health care providers).[8] TravelCenters had moved to strike the whole list.[9] The Blairs had invoked *Burnet* in asking for sanctions less severe than striking all their witnesses, CP 122-23, but did not seek permission to disclose any witnesses, such as a person qualified and prepared to express medical opinions, who had not been on their July 11 list. The court's August 14 Order chose a lesser sanction than the one TravelCenters requested, by limiting the Blairs to seven of their witnesses. The Blairs duly served a revised list of seven witnesses, all non-experts.[10]

The discovery cutoff date of September 4 passed, and on September 13 the Blairs filed two witness-disclosure motions. One sought permission to add an eighth non-expert witness.[11] That motion was denied

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[6] CP 216-17.

[7] Before the second of the deadlines for disclosing possible trial witnesses, the Blairs moved for a continuance of the trial date, citing turmoil in their counsel's officing situation and a busy trial schedule, but not a need for more time to identify and disclose possible witnesses. CP 108-116. The trial court denied the motion to continue the trial date. CP 15-16. The Blairs did not assign error to that ruling on appeal.

[8] CP 429-34.

[9] CP 17-25.

[10] CP 440-44.

[11] CP 218-25.

by order entered on September 21.[12] The Blairs did not assign error to it on appeal and make no argument about it in their petition.

The Blairs' other motion sought "clarification" of the August 14 Order limiting them to seven witnesses.[13] The clarification the Blairs sought consisted of them being permitted to call, in addition to the seven witnesses they had been allowed to disclose belatedly in August, anyone whom *TravelCenters* had listed on its (timely-served) May 2007 witness disclosure. TravelCenters' May 2007 list had included, as possible *non*-expert witnesses, all 35 individuals (and 15 entities) believed to have been Mrs. Blair's health care providers.[14] Because none of the individual providers had been disclosed by the Blairs as a possible fact or expert witness for *them*, and because KCLR 26(b)(4) prohibits calling witnesses at trial who have not been disclosed during discovery as required by KCLR 26(b)(3),[15] TravelCenters had no reason to note depositions of any of them during discovery, and was precluded from interviewing any of them by *Loudon v. Mhyre.*[16] The Blairs' post-discovery-cutoff motion for

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[12] CP 254-55.

[13] CP 226-36.

[14] CP 419-26.

[15] Local Rule 26(b)(4) provides that "[a]ny person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires."

[16] 110 Wn.2d 675, 678, 756 P.2d 138 (1988).

"clarification" of the August 14 Order limiting them to seven witnesses sought the right to call any one of the 35 providers as witnesses at trial,[17] but did not specify which, if any of them, they wanted to call to offer expert opinion testimony as to any particular medical issue, and offered no summary of any expected opinion testimony.

TravelCenters opposed the motion for clarification and the trial court denied the motion by Order entered September 21, 2007.[18] On appeal below, the Blairs did not assign error to the order denying their motion for clarification.

On October 2, 2007, with trial scheduled to begin on October 22, the Blairs served a list of trial witnesses, which included Dr. Owen Higgs and Idaho physical therapist Keith Drury.[19] The Blairs did not indicate that either would be called to give opinion testimony, much less what opinions they expected either witness to express. The Blairs never made an offer of proof that Dr. Higgs or Mr. Drury would give medical causation opinion testimony supportive of their case, or that Mr. Drury was willing to travel from Idaho to Seattle for trial.

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[17] CP 256-57.

[18] CP 256-57.

[19] CP 266-67.

The trial court granted TravelCenters' motion to strike Dr. Higgs and Mr. Drury and imposed $500 in sanctions for adding them as witnesses in violation of the August 14 Order.[20] That set the stage for dismissal of the Blairs' lawsuit. The court initially stayed entry of an order dismissing the Blairs' case for lack of necessary medical expert testimony to afford them an opportunity to seek discretionary review,[21] which they failed to do in a timely fashion, then entered the dismissal order,[22] from which the Blairs appealed.

The Court of Appeals affirmed the trial court. *Blair v. TA-Seattle East #176,* 150 Wn. App. 904, 210 P.3d 1026 (2009).

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Blairs argue that *Burnet* and *Peluso* make it an abuse of discretion *per se* when a trial court does not make certain formal findings in an order striking witnesses, *Petition at* 16, such that the Court of Appeals decision conflicts with those decisions by affirming despite the trial court's failure to make findings on the three points with which *Burnet* is concerned.

There was no *per se* abuse of discretion, and review is not warranted. The concern that *Burnet's* findings requirement addresses is

[20] CP 277-79.

[21] CP 304-06.

[22] CP 307-09.

not the absence of formal findings as such, but whether a record was created in the trial court from which it is apparent to an appellate court that a trial judge struck a party's witness only (a) because of a willful violation by the party of discovery requirements or orders, (b) because the party's adversary would otherwise be prejudiced; and (c) after considering a lesser sanction. As the court explained in *Burnet*:

> When the trial court "chooses one of the harsher remedies allowable under CR 37(b) . . . ***it must be apparent from the record*** that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial [Emphasis added].

Burnet, 131 Wn.2d at 494 (quoting *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989)). Formal findings no doubt are often or usually necessary in order for ***the record*** to make the three *Burnet* propositions ***apparent.*** In this case, however, the Court of Appeals properly concluded that:

> Although the trial court did not enter findings on the record demonstrating its consideration of the *Burnet* factors, ***the record before us provides adequate grounds to evaluate the trial court's decision in imposing discovery sanctions.***

Blair, 150 Wn. App. at 909 (emphasis added). The Court of Appeals was right.

It is evident that the trial court had *considered* lesser sanctions, not only because its October 15 Order, CP 277, states that the court considered the Blairs' arguments opposing the motion (which included arguments based on *Burnet* and *Peluso*, CP 205-08), but because the court had already *imposed* a lesser sanction by entering its August 14, 2007 Order (CP 216-17) giving the Blairs a reprieve from their inadequately justified noncompliance with not one but both of two court-ordered witness disclosure deadlines. As the Court of Appeals put it, "[e]arlier in the discovery process when Blair's deficient disclosure was merely untimely, the trial court's sanctions did not exclude any particular witnesses, save one [a truckdriver identified only as "Jim"[23]], and left Blair to make the determination [as to which witnesses she wanted to keep]." *Blair*, 150 Wn. App. at 910. As *Scott v. Grader*, 105 Wn. App. 136, 141, 18 P.3d 1150 (2001), sensibly concluded, *Burnet* does not apply when an order excludes a witness as a sanction *for violating an earlier order* that *imposed a less severe sanction* for noncompliance with witness-disclosure deadlines. This case is like *Scott*, not like *Burnet*.

Because the Blairs did not show good cause for their noncompliance with court-ordered witness disclosure deadlines and requirements, and because they did not even attempt to justify their

[23] *See* CP 431 (No. 11) and CP 217 (interlineated language).

defiance, on October 2, of the court's August 15 and September 21 Orders, their violations were willful. *E.g.*, *Allied Fin. Servs. v. Mangum*, 72 Wn. App. 164, 168, 864 P.2d 1 (1993). That the Blairs' violation of the August 14 and September 21 orders was willful is readily "apparent from the record" of this case, *Burnet*, 131 Wn.2d at 494, with or without a formal finding saying so.

The Blairs argued below that their noncompliance with the case scheduling order's witness-disclosure requirements had not been willful because their counsel had faced "complications and problems that contributed to the delay in full disclosure of witnesses." *Br. at 11.* The Blairs' petition similarly alludes to "turmoil" and "transition" in her counsel's office as if to justify that noncompliance. *Petition at 6.* The clerk's papers to which the Blairs' brief cited, CP 128-130, were part of a declaration that their counsel filed on *August 9*, 2007 in opposition to TravelCenters' motion to strike their late-served witness disclosure, on which they had listed no health care providers. The excuses offered in the Blairs' counsel's declaration thus did not purport to explain the failure to ask the court for permission to list health care provider witnesses after August 9 and or at any other point prior to the September 4 discovery cutoff or, for that matter, at any time before the Blairs simply added Dr. Higgs' and Mr. Drury's names to their witness list for trial on October 2.

Similarly, findings were not necessary to make it apparent from the record of this case that it would have been prejudicial to TravelCenters' defense to let the Blairs call at trial two undeposed, out-of-county health care providers at trial without even a summary of expected opinion testimony (or indication of whether either person *has* any relevant opinions), and the Blairs never offered such a summary or to make either person available for deposition prior to trial.

The Blairs claimed below that TravelCenters was not prejudiced by their having waited until October 2 to list Dr. Higgs and Mr. Drury as their medical trial witnesses even though the case scheduling order had required disclosure of possible witnesses in May and July, because the company had contended, in opposing the Blairs' June motion to continue the trial, that there was "plenty of time" to complete discovery. *App. Br. at 5 and 11.* The Blairs repeat the argument in their Petition (p. 7). But defense counsel wrote that in early *July* 2007, CP 3, when there *would have been* plenty of time to complete discovery by September 4 had the Blairs identified Dr. Higgs, Mr. Drury, or any of Mrs. Blair's other 32 providers as ones who might be trial witnesses. But the Blairs let the discovery deadline pass without either disclosing possible health care provider witnesses or seeking to call a finite number of such witnesses in addition to the non-expert witnesses they had chosen to disclose.

The result of this case is consistent with *Johnson v. Horizon Fisheries, Inc.*, 148 Wn. App. 628, 201 P.3d 346 (2009), which, like this case, involved a dismissal for violation of court case scheduling orders and a prior sanctions order for noncompliance. The *Johnson* court affirmed the dismissal of the plaintiff's case:

> CR 41(b) authorizes a trial court to dismiss an action for noncompliance with court orders. King County Local Rule 4(g) provides that "[f]ailure to comply with the Case Schedule may be grounds for the imposition of sanctions, including dismissal." While dismissal is disfavored, it is justified when a party's refusal to obey the trial court's order was willful or deliberate and substantially prejudiced the other party. Disregarding a trial court's order without reasonable excuse or justification is considered willful. The trial court must indicate on the record that it has considered sanctions less harsh than dismissal.

Johnson, 148 Wn. App. at 638-39. Rejecting the plaintiff's argument that the trial court should have considered a lesser sanction, the *Johnson* court noted that "***the trial court did more than merely consider using a stay as a less burdensome sanction. It imposed one*** [emphasis added]." That is precisely what had happened in this case before the court struck the two belatedly-listed health care providers. The *Johnson* court concluded that "[a]lthough a CR 41(b)(1) dismissal [without prejudice] would have been less harsh,. . . [b]y the time the trial court dismissed the case, [the plaintiff] had demonstrated that he would not comply with the court's orders." 148 Wn. App. at 641.

The same was true here. Indeed, the Blairs essentially presented the trial court with the choice of either striking Dr. Higgs and Mr. Drury or letting the Blairs defy its August 14 and September 21 orders, to the latter of which they did not assign error below. This is a case in which the record, even without findings, makes it clear that the Blairs did not comply with the case scheduling order and then defied the court's subsequent lesser-sanctions witness-disclosure orders, that the *Burnet* court's concerns were met, and that the trial court did not abuse its discretion.

Not only is the Blairs' *Burnet* argument without merit, but they are unable to show prejudice, because they failed to make an offer of proof that Dr. Higgs and/or Mr. Drury could and would have expressed opinions to support the Blairs' causation and damages allegations. They had provided care to Mrs. Blair, but that does not mean either or both of them had opinions about whether her 2003 fall caused her to need the 2005 hip replacement.[24] Thus, the Blairs cannot show a probability that the October 15, 2007 ruling striking Dr. Higgs and/or Mr. Drury deprived them of admissible evidence that would have enabled them to prove both causation and damages, so a reviewing court is not in a position to hold that the

[24] *See Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections*, 122 Wn. App. 227, 245-247, 95 P.3d 764 (2004), *rev. denied*, 154 Wn.2d 1003 (2005) (offer of proof creates record for adequate review); *compare Aubin v. Barton*, 123 Wn. App. 592, 98 P.3d 126 (2004) (reversing exclusion of expert testimony because proponent had made detailed offer of proof demonstrating its admissibility).

Blairs were prejudiced by the October 15 Order striking those health care providers from their trial witness list.

The Blairs renew in their petition for review an argument that, because they had purported in their August 17 second-chance disclosure to "reserve the right" to call any witness that TravelCenters had listed as possible witnesses in its (timely) witness disclosures, and thus were entitled to name Dr. Higgs and Mr. Drury as trial witnesses (or any one or more of 33 other providers) on October 2 notwithstanding the court's August 15 and September 21 Orders and despite KCLR 26(b)(4). The argument is without merit and does not merit review under any subprovision of RAP 13.4(b) for the reason stated in the Court of Appeals' decision:

> Former KCLR 26(b)(3)(A) and (B) expressly requires that the name, address, and phone number as well as relevant knowledge be provided for any possible lay witness. Further, the rule requires that a summary of opinions and the basis therefore be provided for any possible expert witness. TravelCenters listed Dr. Higgs and Drury as possible nonexpert witnesses. Blair would have her "reservation of rights" convert an adversary's nonexpert witness into an expert without complying with the rules.

Blair, 150 Wn. App. at 910-11. As the Court of Appeals recognized, no authority permits the conversion of an adversary's non-expert witness into one's own expert witness through such a "reservation of rights."

IV. CONCLUSION

A trial court does not deny a plaintiff due process when a court when it holds her responsible for compliance with court rules and orders providing for the orderly pretrial disclosure of possible witnesses. The Court of Appeals decision does not conflict with *Burnet* or *Peluso* because the October 15, 2007 Order that struck the two medical witnesses at issue enforced an earlier (August 14) Order that had imposed a lesser sanction for their noncompliance with the case scheduling order requiring timely disclosure of possible witnesses and a subsequent (September 21) Order to which the Blairs did not assign error. The Blairs defied, and thus willfully violated, the August 14 and September 21 Orders by adding witnesses on October 2, 20 days before trial. Review should be denied.

RESPECTFULLY SUBMITTED this 27th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 27th day of October, 2009, I caused a true and correct copy of the foregoing document, "ANSWER TO PETITION FOR REVIEW," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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Attached for filing in .pdf format is the Answer to Petition for Review in *Blair v. TA-Seattle East #176, d/b/a TravelCenters of America,* Supreme Court Cause No. 83715-5. The attorneys filing this brief are Daniel W. Ferm, WSBA #11466 and Rodney L. Umberger, Jr., WSBA #24948, e-mail addresses: dferm@williamskastner.com and rumberger@williamskastner.com.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MAUREEN T. BLAIR and KENNETH E. BLAIR, Appellants, v. TA-SEATTLE EAST #176, dba TRAVELCENTERS OF AMERICA, Respondent, and OAK HILL CAPITAL MANAGEMENT, INC., Defendant.	)	No. 62033-9-I DIVISION ONE PUBLISHED OPINION FILED: June 29, 2009

GROSSE, J. — A trial court has the authority to strike a party's witnesses as a sanction where there is a showing of intentional or tactical nondisclosure, willful violation of a court order, or unconscionable conduct. A party's failure to meet specific court ordered discovery deadlines is a presumptively willful violation of the court's orders. Here, a personal injury plaintiff repeatedly failed to timely disclose possible witnesses and offered no reasonable explanation for failure to do so. We hold that the trial court acted within its discretion in striking some of the plaintiff's witnesses. Further, because causation could not be established without expert medical testimony, the trial court properly granted summary judgment dismissal. Thus, we affirm.

FACTS

On May 12, 2003, Maureen Blair, an experienced commercial truck driver, stopped at a truck stop off Interstate 90 in North Bend, Washington, where she slipped and fell in a puddle of spilled gasoline near the pumps. Blair was able to drive her truck away from the fill station and continued to work as a commercial truck driver in the following weeks. But Blair suffered from increasing pain and loss of physical abilities, including those required to perform her job, because of degenerative hip arthritis for which she eventually underwent several surgeries. Blair alleges her degenerative hip arthritis was caused by her May 2003 fall at the truck stop. In May 2006, Blair filed a personal injury suit against TravelCenters, the truck stop operator.

On May 10, 2006, under former King County Local Rule (KCLR) 4, the trial court issued an order setting a case schedule. The trial date was set for October 22, 2007. The case schedule also required the parties to disclose possible primary witnesses by May 21, 2007, and any additional possible witnesses by July 2, 2007.[1] On July 11, well after the initial deadline, Blair disclosed a list of possible witnesses that was deficient because it lacked much of the information required under former KCLR 26(b), such as summaries of any expert witnesses' testimony and a brief description of their credentials.

TravelCenters then moved to strike Blair's disclosure of possible witnesses because it was untimely and for no legitimate cause in violation of the trial court's case scheduling order. On August 14, 2007, the trial court granted

[1] See former KCLR 26 (2006).

that motion in part and denied it in part, stating:

> Witness #11 in Plaintiff's Disclosure of Possible Primary Witnesses is stricken. Of the remaining 14 witnesses, plaintiff shall select 7 to be called as witnesses and notify defendant by August 17, 2007 which 7 are to be called. The motion to strike 7 of the 14 witnesses is granted. Plaintiff shall pay Defendant $750.00 in terms.

The trial court did not enter written findings when it struck seven of Blair's fourteen untimely disclosed possible witnesses. With one exception, the court did not specify which witnesses must be stricken, only how many. Blair produced an amended possible witness disclosure list on August 17.[2] One month later, Blair moved for clarification of the trial court's August 14 order striking witnesses and imposing sanctions. Blair specifically sought the court's assurance that she could call certain witnesses that TravelCenters had previously identified in its own disclosure lists and whom Blair had "reserved" the right to call. Those witnesses included Dr. Owen Higgs and Keith Drury, a physical therapist. The clarification motion was denied.

On October 8, Blair filed a pretrial witness list under former KCLR 16(a)(4) (2006), naming eleven possible witnesses, including Dr. Higgs and Drury. On October 15, the trial court granted TravelCenters' motion to strike those two witnesses. Without Dr. Higgs or Drury, Blair had no expert medical witnesses for trial.

On October 19, TravelCenters moved for dismissal or summary judgment because Blair could not meet her burden of proof absent expert medical opinion.

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[2] The trial court denied Blair's subsequent request to add to her possible witness disclosure list an entirely new witness, an employee from the truck stop, because the witness's contact information had only recently been discovered

Without such testimony, TravelCenters argued that Blair could not prove her degenerative hip arthritis and related surgeries were the result of her May 12, 2003 fall at the truck stop[3] or that such costs for treatment were necessary and reasonable. On June 30, 2008, the trial court granted summary judgment dismissal. Blair timely appeals.

ANALYSIS

A trial court has broad discretion in deciding whether and how to sanction a party for violations of discovery orders.[4] Absent a manifest abuse of this discretion, we will not overturn a trial court's choice of sanctions for noncompliance with a discovery order.[5] A trial court may properly exclude witnesses or testimony as a sanction where there is a showing of intentional or tactical nondisclosure, willful violation of a court order, or unconscionable conduct.[6] A violation of a court order without reasonable excuse will be deemed willful.[7] Here, Blair failed to comply with the trial court's discovery orders and was unable to provide any legitimate reason for that failure. Therefore, Blair's violation of discovery orders is deemed willful. The trial court did not abuse its discretion when it struck seven of Blair's possible witnesses and when it struck Dr. Higgs and Drury from the pretrial witness and exhibit list.

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[3] Neither Dr. Higgs nor Drury was ever deposed, so it is unknown what the substance of their testimony at trial might have been.
[4] Goodman v. Boeing Co., 75 Wn. App. 60, 84, 877 P.2d 703 (1994), aff'd on other grounds, 127 Wn.2d 401, 899 P.2d 1265 (1995).
[5] Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).
[6] Burnet, 131 Wn.2d at 494; Allied Fin. Servs., Inc. v. Magnum, 72 Wn. App. 164, 168, 864 P.2d 1 (1993).
[7] Allied Fin. Servs., 72 Wn. App. at 168-69; Gammon v. Clark Equip. Co., 38 Wn. App. 274, 280, 686 P.2d 1102 (1984).

Blair argues that the harsh sanctions cannot be sustained because of the court's failure to enter written findings explaining the court's rationale in accordance with Burnet v. Spokane Ambulance.[8] Although the trial court did not enter findings on the record demonstrating its consideration of the Burnet factors, the record before us provides adequate grounds to evaluate the trial court's decision in imposing discovery sanctions.[9] As our Supreme Court observed in Mayer v. Sto Industries, Inc., "nothing in Burnet suggests that trial courts must go through the Burnet factors every time they impose sanctions for discovery abuses."[10]

The purpose of imposing sanctions generally is to deter, to punish, to compensate, and to ensure that the wrongdoer does not profit from the wrong.[11] The trial court also has an interest in effectively managing its caseload, minimizing backlog, and conserving scarce judicial resources that justify the imposition of appropriate sanctions.[12]

Here, the trial court tailored its sanctions to the circumstances present. Earlier in the discovery process when Blair's deficient disclosure was merely untimely, the trial court's sanctions did not exclude any particular witnesses, save

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[8] 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).
[9] Blair cites Division Three's opinion in Peluso v. Barton Auto Dealerships, Inc., 138 Wn. App. 65, 69, 155 P.3d 978 (2007), for the proposition that this failure is reversible error per se. We decline to follow Peluso and its reasoning interpreting the Burnet decision.
[10] 156 Wn.2d 677, 687-88, 132 P.3d 115 (2006).
[11] Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993) (citing Burnet, 131 Wn.2d 495-96).
[12] See Woodhead v. Discount Waterbeds, Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1995) (citing Wagner v. McDonald, 10 Wn. App. 213, 217, 516 P.2d 1051 (1973)).

one, and left Blair to make the determination. The trial court did not err in excluding the two expert witnesses Blair identified only a few weeks prior to trial.

Blair's argument that she reserved the right to call any possible witnesses previously disclosed by TravelCenters under former KCLR 26(b) is without merit.[13] Former KCLR 26(b)(3)(A) and (B) expressly requires that the name,

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[13] Blair relies on former KCLR 26(b) (2006) and the official comment to the rule:

> **(b) Disclosure of Primary Witnesses. Required Disclosures**
>
> (1) *Disclosure of Primary Witnesses:* Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial.
>
> (2) *Disclosure of Additional Witnesses:* Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons whose knowledge did not appear relevant until the primary witnesses were disclosed and whom the party reserves the option to call as witnesses at trial.
>
> (3) *Scope of Disclosure:* Disclosure of witnesses under this rule shall include the following information:
>
> (A) All Witnesses. Name, address, and phone number.
>
> (B) Lay Witnesses. A brief description of the witness's relevant knowledge.
>
> (C) Experts. A summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications.
>
> (4) *Exclusion of Testimony.* Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.
>
> . . . .
>
> **Official Comment**
>
> This rule does not require a party to disclose which persons the party intends to call as witnesses at trial, only those whom the party might call as witnesses. Cf. LCR 16(a)(3)(A) (requiring the parties, not later than 21 days before trial, to exchange lists of witnesses whom each party "expects to call" at trial) and Official Comment to LR 16.
>
> This rule sets a minimum level of disclosure that will be required in all cases, even if one or more parties have not formally

address, and phone number as well as relevant knowledge be provided for any possible lay witness. Further, the rule requires that a summary of opinions and the basis therefore be provided for any possible expert witness. TravelCenters listed Dr. Higgs and Drury as possible nonexpert witnesses. Blair would have her "reservation of rights" convert an adversary's nonexpert witness into an expert without complying with the rules.

Blair was barred from adding additional witnesses other than the seven identified after the court ordered seven of the fourteen untimely disclosed stricken. The court's denial of the clarification in which Blair specifically requested she be allowed to name as possible witnesses, some that had previously been identified by TravelCenters, should have left no doubt as to the court's order. And again, at no time did Blair provide the trial court with any valid reason for her delay in failing to comply with the case schedule's discovery deadlines. Difficulty in locating possible witnesses' contact information or in timely taking depositions of known possible witnesses does not excuse a party from compliance with court ordered deadlines. Blair had received TravelCenters' disclosure that included information for Dr. Higgs and Drury in May 2007, but made no attempt to depose or otherwise secure their appearance at trial until that August.

Without expert medical testimony, Blair cannot establish the existence of

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requested such disclosure in written discovery. The rule is not intended to serve as a substitute for the discovery procedures that are available under the civil rules to preclude or inhibit the use of those procedures. Indeed, in section (f) the rule specifically provides to the contrary.

an element essential to her claim on which she bears the burden of proof. Here, Blair must prove: (1) the existence of a duty, (2) a breach of that duty, (3) resulting injury, and (4) that her injuries were proximately caused by the breach.[14] Here, she is unable to prove the third and fourth elements without expert medical testimony. Blair could testify at trial regarding her fall, its alleged impact on her, and her resulting surgeries, but she cannot establish proximate causation. That lack of proof on proximate causation is fatal to Blair's case. The trial court properly granted summary judgment to TravelCenters.

The trial court is affirmed.

Grosse, J.

WE CONCUR:

Appelwick, J.

Cox, J.

[14] Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).